IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 348

ANDREW JORDAN, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,

Petitioner,

vs.

SAM DE GEORGE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

THOMAS F. DOLAN,
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OPINION BELOW.

The opinion of the Court of Appeals (R. 48-55) is reported at 183 F. 2d 768. The District Court wrote no opinion (R. 42).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 10, 1950 (R. 55). The petition for a writ of certiorari was filed October 6, 1950, and was granted November 27, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

It is agreed that the only question presented to the court is whether or not a conspiracy to violate the Internal Revenue Code (Title 26, U. S. C. 3321) is a crime involving moral turpitude within the meaning of Section 19(a) of the Immigration Act of 1917.

STATEMENT.

The petitioner sets forth in a statement of facts that the respondent was convicted in the year 1924 for transporting liquors and was sentenced to a term in the reformatory and that he was convicted again in the year of 1941 and fined in the sum of $30.00 for transferring license plates. These convictions, the first when the respondent was 20 years of age, are not relevant to the issues involved and should not have been set forth in the petitioner's brief.

The respondent was born in Palermo, Italy, in the year 1904; he migrated to this country in the year of 1921 at which time he was 17 years of age; he married an American citizen, of which marriage one child was born who is now 19 years of age and a student at an American university; that marriage ended in divorce in the year of 1939; in 1944 the respondent married for the second time and again to an American citizen. He maintains his home at Harvey, Illinois, where he owns a half interest in property valued at approximately $20,000.00. He is employed as a chef in a restaurant of which he is half owner.

The respondent was indicted in May, 1937 under Title 18 U. S. C. 88, for conspiracy to violate the Internal Revenue Code and to this indictment he pleaded guilty and was sentenced to a term of one year and one day in the penitentiary which term was duly served.

Again in December, 1939, he was indicted for conspiracy, as before, to violate the Internal Revenue Code, and after a trial was sentenced to the penitentiary for a term of two years which term he duly served.

The respondent has not been arrested or charged with any crimes or infractions of the laws of the United States, the State of Illinois, or any of its political subdivisions since his discharge from the penitentiary as related above. The respondent is now 46 years of age and has lived in this country for twenty-nine years.

He was duly registered pursuant to the Selective Service Act as an alien on October 16, 1940, at local board #12, Lansing, Illinois. He has again registered pursuant to the requirements to the recent security act passed by Congress.

The original warrant for this deportation involved in this proceedings was issued out of the Office of Immigration and Naturalization Service on October 10, 1941 (R. 10-11). He was arrested on January 15, 1942 (R. 6) and a hearing was held on the 7th day of May, 1942, at the United States Penitentiary at Leavenworth, Kansas (R. 11-13). This hearing was continued until the 14th day of September, 1943, where it was resumed in Chicago, Illinois (R. 13-23).

On January 11, 1946, there was issued out of the Department of Justice a warrant of deportation (R. 41) directing that the respondent be deported to Italy on the charge that he was subject to deportation under the Immigration Act of February 5, 1917, Title 8, Section 155 A, 39 Stat. 889, in that the respondent had been sentenced more than once for a term of one year or more for the commission of a crime involving moral turpitude subsequent to his entry in the United States.

On the 8th day of March, 1949, a petition for Writ of Habeas Corpus was filed in the United States District Court for the northern District of Illinois, Eastern Division.

That on the 3rd day of October, 1949, the Honorable

William J. Campbell, one of the judges of the said court, after considering the evidence and law remanded the respondent to the custody of the petitioner, determining that the crimes for which the petitioner was indicted did involve moral turpitude.

The decision of the District Court for the Northern District of Illinois was duly appealed and judgment of the Court of Appeals in the 7th Circuit entered on July 10, 1950, reversed the order of the District Court and remanded the cause with directions to enter an order discharging the respondent (R. 55).

SUMMARY OF ARGUMENT.

The immigration statute does not provide that an alien convicted of two felonies or two serious crimes should be deported; the statute limits the deportation to aliens who have committed two crimes "involving moral turpitude."

To determine whether or not an act or a crime involves moral turpitude, a definition of that term must be formulated. The various courts have from time to time defined moral turpitude to consist of the ingredients of baseness—as something vile, repugnant and depraved.

Such definition was in the minds of the Committee of Immigration and Naturalization in 1916 when it was considering this act now before the Court.

The petitioner seeks to banish and exile the respondent from his adopted land; the action sought by the petitioner is penal in nature, and the statute must accordingly be construed in favor of the respondent.

ARGUMENT.

I.

Congress Did Not Intend That the Statute Under Which the Deportation Proceedings Are Being Executed Should Embrace the Crime of Conspiracy to Evade Excise Taxes.

In the hearings before the Committee of Immigration and Naturalization of the House of Representatives, Sixty-fourth Congress, First Session (H. R. 10384), held on March 11, 1916, before which Committee Mr. Arthur Woods, Police Commissioner of New York City, appeared, there is running through the testimony and statements by Mr. Woods and Congressman Sabath, an intent that the legislation under consideration should apply to those aliens who commit crimes of vileness; on pages 11 and 12 of the minutes of the hearing Mr. Woods related:

> "Mr. Woods: The second point I would like to make is one that is not covered in the present law. That is, that when the foreigner comes to this country legally, has not committed a crime abroad, but has a right to come in, and after he is here, prior to the time that he becomes a citizen he is convicted of a felony or serious crime—*you can phrase that as you think best*—I believe then that we should have the right to deport him. * * * *Now, I suggest a simple variation, that instead of saying that he must be convicted and sentenced for a year or more, I should say that he should be deported if he be convicted of a crime involving moral turpitude.* * * * We do not want aliens who commit serious crimes."

Petitioner argues that "the off-hand views expressed by ordinary witnesses at committee hearings" are not a reliable index to determine Congressional intent. Despite

what petitioner may contend, the Committee suggested and Congress adopted the proposals of Mr. Woods. As a matter of fact, the suggestions of Commissioner Woods were diluted in that the law as adopted provided after an alien was here five (5) years, he must be twice convicted. But the proposals of Mr. Woods that the crime be not catalogued as carrying a sentence of a year or more, but that it be defined as "involving moral turpitude" was adopted verbatim. He then gave the Committee two examples, one of which involved a murder and the other a stabbing. The Committee apparently did not consider him to be an "ordinary witness."

On page 14 of the Minutes, Mr. Woods said:

> "I would make provision to get rid of an alien in this country who comes here and commits felonies and burglaries, holds you up on the streets, and commits crimes against our daughters, because we do not want that kind of alien here, and they have no right to be here."

The Police Commissioner further stated on page 12:

> "* * * The rule is that if we get a man in this country who has not become a citizen, who knocks down people in the street, who murders or attempts to murder people, who burglarizes our houses with blackjacks and revolvers, who attacks our women in the city, those people should not be here, * * *"

On Page 16, Congressman Sabath stated:

> "Well, I am against the criminal and always have been, but I have always believed in giving a man a chance who, due to conditions, commits some offense which really was not the crime of a hardened criminal, or where it is not a crime against the State or the people."

The crimes which the Committee had in mind, as indicated by the statements above quoted appeared to be di-

rected at crimes of violence such as burglaries, murders and other offenses and assaults against the people and dignity of the community. The Committee talked of the hardened criminal and felt that if he had been convicted a second time for such an offense, that the violator could be classed as such a criminal and thereby subject to deportation.

The petitioner argues that from the language used by the Committee the statute was aimed at a person who committed a serious crime, a confirmed criminal, a repeater. The respondent agrees that the statute was aimed at a person who committed a serious crime, provided such crime "involved moral turpitude"; the respondent agrees that it was aimed at a confirmed criminal, provided such criminal was convicted of crimes "involving moral turpitude"; the respondent agrees that the statute was aimed at a person who is a repeater, provided that the repeater has been sentenced various times for crimes "involving moral turpitude."

By the use of the words "involving moral turpitude" Congress obviously intended to limit and restrict the crimes for which an alien could be deported; in other words, an alien was not to be deported for all felonies or crimes, but only for those acts which involved moral turpitude.

The Committee hearing ended with the Chairman stating to Police Commissioner Woods, "We are much obliged to you. Mr. Parker will prepare a couple of amendments along the lines that you have suggested."

On March 30, 1916, Mr. Burnett, Chairman of the Committee, introduced an amendment to the House of Representatives to deport the alien who had committed a crime prior to his admission into this country because under the existing law the time limit

"* * * would prevent a deportation of a man who

committed murder or any other crime involving moral turpitude on the other side." Congressional Record, Page 5164, 64th Congress, March 30, 1916.

This amendment was adopted by the House of Representatives without discussion or debate.

In *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, the Court had before it the problem of determining "the meaning of the statutory words 'sentenced more than once.'" To assist the Court in arriving at its decision a review of the debate on the floor of Congress was made to find the purpose of the amendment from its legislative history.

It has long been recognized that the Court should determine the intention of the legislature and enforce that intent. *Pennington* v. *Coxe*, 2 Cranch. 33.

II.

Moral Turpitude Refers to an Act of Baseness, Vileness and Depravity of Mind.

The term moral turpitude implies an act or offense that the community considers to be essentially immoral. The phrase has on numerous occasions been defined by the courts. The problem lies not in defining the term but rather in determining the offense or act that is morally wrong. The problem was recognized, as appears from the Minutes of the Hearing before the Committee on Immigration and Naturalization on page 8, when Mr. Woods recommended deportation for crimes involving moral turpitude Mr. Sabath replied:

"But you know that a crime involving moral turpitude has not been defined. No one can really say what is meant by saying a crime involving moral turpitude."

The Court of Appeals for the Seventh Circuit, in *Ng Sui Wing* v. *United States*, 46 F. (2d) 755, defined the term moral turpitude (P. 756) as:

> "An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

In *U. S. ex rel. Monzella* v. *Zimmerman*, 71 F. Supp. 534 (E. D. Pa.) (1947) the Court had before it an alien who while awaiting trial for bank robbery escaped from prison. The Immigration Authorities sought to deport him for committing two crimes involving moral turpitude. On appeal the Court held that the prison break did not involve moral turpitude saying (P. 537) that the term had never been clearly defined.

> "* * * because it refers not to legal standards, but rather to those charging moral standards of conduct."

Conspiracy to Defraud the United States of Excise Taxes on Distilled Liquors Is Not a Crime Involving Moral Turpitude.

Having defined the term it becomes necessary to evaluate the act or offense that stands accused of being morally wrong; of being morally repugnant to the conscience of the community.

In *Schmidt* v. *United States*, 177 F. (2d) 450 (C. C. A. 2d) (1949), the Court had to determine whether or not an applicant for citizenship established that he was a person of "good moral character" when he admitted that he had occasional sexual intercourse with single and unmarried women:

> "Even though we could take a poll, it would not be enough merely to count heads, without any appraisal

of the voters. A majority of the votes of those in prisons and brothels, for instance, ought scarcely to outweigh the votes of accredited churchgoers. Nor can we see any reason to suppose that the opinion of clergymen would be a more reliable estimate than our own. The situation is one in which to proceed by any available method would not be more likely to satisfy the impalpable standard, deliberately chosen, than we adopted in the foregoing cases: that is, to resort to our own conjecture, fallible as we recognize it to be."

The Attorney General on July 12, 1944, approved an opinion of the Solicitor of the Department of Labor quoted in Volume 2 of Administrative Decisions under Immigration and Naturalization Laws of the United States, P. 141 which was set forth by the Circuit Court (R. 50) stating in part that:

"A crime involving moral turpitude may be either a felony or a misdemeanor, existing at common law or created by statute, and is an act or omission which is *malum in se and not merely malum prohibitum*; • • • which is so far contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace • • •"

During the period of our history that the 18th Amendment was in effect and enforced by the various prohibition laws, the act of making, possessing or selling alcoholic liquors was unlawful and the question arose during that time as to whether or not the violation of the prohibition laws involved moral turpitude.

In *United States ex rel. Iorio* v. *Day*, 34 F. 2d 920 (C. A. 2) the Court was called upon to determine this problem and said (p. 921):

"We do not regard every violation of the prohibition law as a crime involving moral turpitude. No doubt it is the solemnly declared policy of this country that liquor shall not be made, sold or possessed, but the

standard set up in Sections 3 and 19 of the act of 1917 (8 U. S. C. A., §§ 136, 155) was purposely narrower than that. All crimes violate some law; all deliberate crimes involve the intent to do so. *Congress could not have meant to make wilfullness of the act a test; it added as a condition that it must be shamefully immoral.* There are probably many persons in the United States who would so regard either the possession or sale of liquor; but the question is whether it is so by the common conscience, a nebulous matter at best. * * * We cannot say that among the commonly accepted mores the sale or possession of liquor as yet occupies so grave a place; nor can we close our eyes to the fact that a large number of persons, otherwise reputable, do not think it so, rightly or wrongly." *Coykendall* v. *Skrmetta*, 23 F. 2d 120 (C. A. 5); *Bortos* v. *U. S. District Court*, 19 F. 2d 722 (C. A. 8).

Since the repeal of the 18th Amendment and the prohibition laws, the act of making, possessing and selling of distilled liquors is controlled and regulated by the Federal Alcohol Administration Act, 49 Stat. 977, 27 U. S. C. A. 201-212. Petitioner admits that had the respondent been indicted under this law, the offense would not have involved moral turpitude as it is merely a regulatory statute. The respondent was actually guilty of four crimes, to-wit, violations of the Alcohol Administration Act and the conspiracies. Yet the offenses, as judged by the "common conscience" are the same—he was "bootlegging". The petitioner is arguing in effect, "We cannot deport this man because he was a 'bootlegger' (*United States ex rel. Iorio* v. *Day, supra*) so we will proceed on the theory of a conspiracy to defraud the United States of revenue."

In support of its position, petitioner relies upon several cases—*Guarneri* v. *Kessler*, 98 F. 2d 580 (C. A. 5) (1930); *Maita* v. *Haff*, 116 F. 2d 337 (C. A. 9) (1940), and the leading decision, *United States ex rel. Berlandi* v. *Reimer*, 113 F. 2d 429 (C. A. 2) (1940) which was carefully re-

viewed by the court below and found to be untenable. In the *Berlandi* case the Court reasoned that if the Volstead Act and the various prohibition laws were in effect, the violator could be prosecuted either for breaching those laws or under the internal revenue statutes. Such prosecutions on either theory "were but alternatives" (p. 430) and would be treated alike as far as the question of moral turpitude was concerned. This is the same court that decided *United States ex rel. Iorio v. Day, supra,* wherein it was held that violations of the Volstead Act did not involve moral turpitude. Thus, prior to repeal, a conviction of defrauding the United States of revenue on distilled liquors did not involve moral turpitude. The *Berlandi* court then reasons that since repeal that a violation of the internal revenue laws becomes one of specific intent to enhance profits—"rather than of satisfying the demand for liquor which the Prohibition Act refused to sanction" (p. 430). Somehow the court overlooked the issue of moral turpitude, and nowhere in the decision is the phrase defined. The Court for the 2nd Circuit further could not determine any difference between defrauding the government and defrauding an individual. Not to condone fraud, but to distinguish, the respondent argues that a tax due and owing to the government is a debt or an obligation created by the acts and conduct, lawful or unlawful, of the taxpayer; thus an industrious citizen by his diligence and hard work during a given tax period may receive a large income on which there is a certain tax due the government; this is a debt and obligation due the taxing bodies. If he attempts to evade that debt due the government, he is guilty of a crime; but he cannot be classified with one who by stealth and deceit defrauds his neighbor of money or chattels that the latter has accumulated through his efforts. In the *Berlandi* case Justice L. Hand in his dissent could not entertain the thought of the majority that there was no differ-

ence between fraud on the government and fraud on an individual, saying (p. 431):

> "* * * and surely it is quite beyond measure to compare its disrepute with defrauding an individual."

The dissent further stated (p. 431):

> "There is always the danger in construing this statute that we shall substitute logic for fact and deport a man for what people ought to consistently think of him, rather than for what they do; * * * But, as we said in *United States ex rel. Iorio* v. *Day*, 2 Cir., 34 F. 2d 920, we must try to appraise the moral repugnance of the ordinary man towards the conduct in question; not what an ideal citizen would feel."

Petitioner relies upon the case of *Guarneri* v. *Kessler, supra*, where the alien was convicted of smuggling in violation of the Tariff Act of 1930, 19 U. S. C. A. 1593 (a). The Court stated that moral turpitude had generally been defined by the courts as (p. 581):

> "Anything done contrary to justice, honestly, principle or good morals."

No cases are cited to support such a definition. To reinforce the finding that smuggling involved moral turpitude it is stated that smuggling was a crime at common law. Respondent will admit that it was a crime *before* the common law; when "man" wore loin cloths in primitive tribes, perhaps the most serious offense was the introduction into that suspicious group of something foreign; the new and the strange was hated and feared.

Marita v. *Haff*, 116 F. 2d 337 (C. A. 9) (1940) cited by petitioner, without discussion or citation of authority, announces (p. 337):

> "This crime (conspiracy to defraud the government) involves moral turpitude."

Petitioner does not contend in this proceeding that the respondent committed a crime or violated any statute by making liquor—the act itself was not wrong. In *United States ex rel. Andreacchi* v. *Curran*, 38 F. 2d 498 (S. D. N. Y.) (1926) the alien was convicted of violating the Harrison Anti-Narcotics Act. In finding that such violation did not involve moral turpitude, the Court said (p. 499):

> "The crime consists not in engaging in narcotic traffic, but in merely failing to register, pay a tax and comply with certain regulations of the Internal Revenue Commissioner. It is to be regarded solely as a revenue act * * *
>
> "The fact that the thing may be done, providing a tax is paid to the government, indicates that the act itself does not involve moral turpitude."

To the same effect in *United States* v. *Carrollo*, 30 F. Supp. 3 (W. D. Mo.) (1939) wherein the Court said (p. 6):

> "The 'moral turpitude' that may be involved in a crime does not exist merely because there has been a crime, a violation of law. In a sense, it is immoral to violate any law, even a traffic ordinance, but here the words 'involving moral turpitude' clearly suggest something more serious, for otherwise they are pure surplusage. *The 'moral turpitude' must exist entirely apart from the fact that some statute has been violated.* If a crime is one involving moral turpitude it is because the act denounced by the statute grievously offends the moral code of mankind and would do so even in the absence of a prohibitive statute. The moral code of mankind was not enacted and it cannot be amended by legislature."

Respondent was convicted of violating the Internal Revenue laws; yet one resident of the community, a real estate dealer, stated that respondent was a good citizen except when "he became mixed with bad company and violated the liquor law" (R. 40). This real estate man, who would likely be more familiar with the distinction between

the liquor law and the excise tax levied on liquor, believed that respondent had violated the liquor laws; it would follow that most of the people of the community, except perhaps lawyers, thought he had been indicted for liquor law violations. As appears from his testimony before the Immigration Inspector the respondent thought he had been indicted and convicted for "conspiracy to violate the liquor laws" (R. 18).

Petitioner sets forth in detail the dependence of the government on the collection of taxes. It must be stressed that this is not a proceeding to collect taxes due the government; there is ample machinery for that purpose as respondent well knows; he has been punished for violating the Internal Revenue Code and served the confinement period.

In this proceeding the Immigration Authorities are seeking to banish and exile the respondent from this country in which he has resided for a period of some thirty years, where his family resides and which is his home. Justice Douglas, in *Fong Haw Tan* v. *Phelan, supra,* at page 367, said:

> "* * * deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo* v. *Carmichael,* 332 U. S. 388, 68 S. Ct. 10. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

From the cases on the subject defining moral turpitude, it has frequently been stated that the act must be base, vile or depraved. The respondent here sold liquor, which act is not unlawful; it is the failure to pay the tax. It

will be noted that such failure is not the violation of a prohibiting statute. The statute states that if one sells liquor there must be paid to the Government an excise tax. Rather than being a prohibitive statute, it is one that compels the doer to do an affirmative act. It is stated in the cases cited herein that the criterion for determining whether or not the element of moral turpitude is involved is to view the act as though there were no violations of any law or statute. Applying that test to the criminal acts herein alleged, it could not be argued with any seriousness that the failure to pay the tax was an act which involved moral turpitude.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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